Supreme Court, U.S.
FILED
JUN 12 1992
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NO. 91-1792

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Petitioners,

-vs-

JOHN HARVEY ADAMSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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MEMORANDUM

The most interesting feature of Adamson's opposition to Arizona's petition for certiorari is that it does the same thing the Ninth Circuit did in the opinion of January 30, 1992: it just ignores the landmark case of Teague v. Lane, 489 U.S. 288 (1989). Neither the Ninth Circuit nor Respondent wants to engage in a retroactivity analysis under Teague -- because the only two underpinnings left for the Ninth Circuit's opinion could not withstand a proper analysis. So, the easiest thing to do is to ignore Teague -- that way nobody has to engage in the analysis this Court has found crucial to the creation and application of new rules in a collateral proceeding.

Petitioners emphasize that Petitioners were not asking the Ninth Circuit to

recall the mandate: the mandate had never issued. The fact is that Petitioners, in their supplemental brief of October 1990, a brief ordered by the Ninth Circuit, did bring Teague to the attention of that court. Yet, after 15 months of sitting on the case after oral argument in November 1990, the Ninth Circuit produced a paragraph saying, in essence, that it was not going to consider Teague because Petitioners had not raised the case in our petition for certiorari to this Court in 1989. Respondent may call that what he will; it amounts to nothing more than a refusal to even consider applying controlling authority from this Court that was called to the attention of the Ninth Circuit before the mandate issued.

What makes the Ninth Circuit's refusal to apply Teague even more exasperating is

that, even before Teague, four of the 11 judges dissented from the majority holding on prosecutorial vindictiveness, and five dissented from the holding on arbitrary sentencing. When one couples that with the fact that this Court in Walton v. Arizona, 497 U.S. ___, 110 S. Ct. 3047 (1990), eviscerated the Ninth Circuit's opinion in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), on all four constitutional questions wrongly decided by that court -- and noted in Walton that this Court granted certiorari because Walton relied on Adamson -- one could readily conclude that there was an excellent chance that the majority that wrongly decided four constitutional issues had probably wrongly decided the two nonconsitutional issues. When one adds Teague to the equation, the odds that the majority were

wrong on the other two issues are overwhelming.

Neither the Ninth Circuit nor Respondent asserts that Petitioners have "waived" the Teague claim, although the Ninth Circuit obliquely hinted at that by noting that Petitioners did not cite the case when petitioning this Court for certiorari in 1989. (Appendix A at 30-31 to the Petition for Writ of Certiorari.) In that regard, it is fitting to point out that the parties in Teague did not brief or argue the issue of retroactive application of new procedural rules. In their dissent in Teague, Justices Brennan and Marshall observed that this Court decided that issue without benefit of briefing or oral argument on it by the parties, and "with no more guidance from the litigants than a 3-page discussion in an amicus brief." 489 U.S. at 330. Yet

this Court obviously thought the principle so important that the Court announced it in Teague. In view of that, the Ninth Circuit's refusal to apply the case after full briefing and oral argument on it before the mandate issued, hardly accords Teague the respect and importance this Court gave the case.

This Court said in Collins v. Youngblood, ___ U.S. ___, 110 S. Ct. 2715, 2718 (1990), that retroactivity is a "threshold question" that must be addressed by a federal court on collateral review unless the court's exercise of jurisdiction is limited or the State affirmatively chooses to waive the retroactivity issue. The following circuits have adhered to this threshold requirement. Smith v. Black, 904 F.2d 950, 981 n.12 (5th Cir. 1990) (Teague and its progeny require that a federal court

reviewing a state prisoner's conviction or sentence first determine the issue of retroactivity); Hill v. McMackin, 893 F.2d 810, 813 (6th Cir. 1989) (federal courts are "compelled" by Teague to address the retroactivity issue when collaterally reviewing state court convictions, even if not raised or addressed by the parties); Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir. 1989) (en banc) (Teague and its progeny mandate that a federal court on habeas corpus review first determine the retroactivity issue, even if not raised by the state).

Different panels of the Ninth Circuit properly applied Teague to deny relief months before the limited Adamson en banc panel released its January 30 decision, and those other panels denied relief even when the defendants could point to

concrete authority from this Court that would have given them relief if their convictions had been on direct review instead of collateral review. Carriger v. Lewis, 948 F.2d 588, 595-99 (9th Cir. 1991) (motion for rehearing pending) (because petitioner's conviction became final before the Supreme Court decided Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2383, 65 L. Ed. 2d 392 (1980), Teague v. Lane forbad application of Beck even though the Arizona Supreme Court reached the merits of the Beck claim); Greenawalt v. Ricketts, 943 F.2d 1020, 1023-25 (9th Cir. 1991) (rehearing and rehearing en banc denied) (for purposes of Teague, Minnick v. Mississippi, 498 U.S. ___, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), announced a new rule and could not be applied on collateral review).

The limited en banc panel has abused its discretion by refusing to apply authority from this Court that other panels of that same court have recognized and properly applied before the latest en banc decision came out. That leads to inconsistent and unjustifiable results from within the same circuit that could have been avoided, and would have been, if the en banc panel had applied the Teague analysis. By saying this, Petitioners do not abandon reliance on Alabama v. Smith, 490 U.S. 794 (1989). Three Justices of this Court in 1990 -- with two Justices not participating -- and three judges of the Ninth Circuit limited en banc panel, found Smith, Walton, and Jeffers sufficient reason to reconsider the 1988 en banc opinion. When one couples that with Teague, Petitioners' case is even stronger.

Adamson says that it is inconsistent for Petitioners to pursue this matter and yet to also have concluded a new agreement with him for his testimony in the anticipated upcoming retrial of Max Dunlap and James Robison. The Court should remember that this case began 12 years ago when Adamson refused to cooperate in preparation for the retrial of Dunlap and Robison unless certain "nonnegotiable demands" were met by the State. That breach triggered Adamson's prosecution for first-degree murder and brought the case to this Court in Ricketts v. Adamson, 483 U.S. 1 (1987). Not being clairvoyant, Petitioners do not know what John Harvey Adamson will do at the moment of trial because that moment has not yet arrived. Common sense dictates that if the Ninth Circuit's erroneous opinion is left intact, he will

be under no compulsion to cooperate to avoid the death penalty because the Ninth Circuit has already given him that relief. Adamson has balked before.

CONCLUSION

Petitioners realize that in the most technical, narrow sense, one question before the Court is whether the Ninth Circuit has abused its discretion by refusing to consider new authority from this Court, called to that court's attention before the mandate issued, that would have changed the outcome of the case. That question, however, should not be considered in a vacuum. Under the particular circumstances of this case, as noted by the three dissenters from the limited en banc opinion, the Ninth Circuit should have reconsidered the only two bases left for upholding its conclusion. It did not consider Teague

v. Lane and conclude that Teague would have made no difference in the result. The Ninth Circuit could not do that, so it simply ignored Teague.

If this Court believed that the principles announced in Teague were so important that the Court announced them even though the parties did not brief or argue them, then the Ninth Circuit has abused its discretion by ignoring those principles. Teague and numerous other federal habeas cases from this Court discuss at length the problem of finality in state convictions and the great costs extracted from the state judiciary when federal courts create and apply new rules on collateral review, rules that did not exist when the defendant's conviction became final and rules that cannot fit into either of the exceptions of Teague. The Ninth Circuit has created and applied

new rules in this case. No case from this Court dictated the result the Ninth Circuit reached on prosecutorial vindictiveness and arbitrary sentencing, and the new rules do not satisfy either of the Teague exceptions.

Petitioners respectfully ask the Court to grant certiorari, to apply Teague, and to reverse the Ninth Circuit.

DATED this 12th day of June, 1992.

Respectfully submitted,

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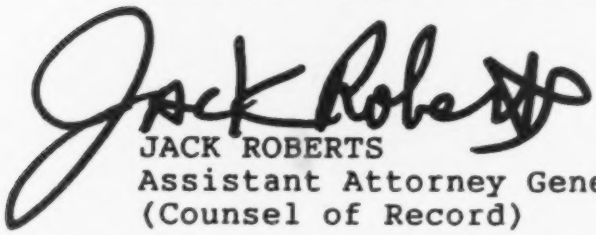

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